In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 605

DAVID MCREYNOLDS AND FRITZ PAPPENHEIM,
PETITIONERS

v.

ROBERT K. CHRISTENBERRY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The petitioners seek review, prior to judgment in the court of appeals, of an order of the district court dismissing an action challenging the constitutionality of 39 U.S.C. 4008. That section requires the postal authorities to detain unsealed mail matter which, under Section 1(j) of the Foreign Agents Registration Act, 22 U.S.C. 611(j), constitutes "communist political propaganda" and which originates, is printed or otherwise prepared in a foreign country. The postal authorities are required to detain all such mail which is

not furnished pursuant to subscription and which is not known to be desired by the addressee, and are to deliver such mail only upon the addressee's request.

The constitutionality of Section 4008 is also involved in *Lamont* v. *Postmaster General*, No. 491, this Term, pending on jurisdictional statement. In the *Lamont* case a three-judge district court dismissed a similar suit, holding (1) that any controversy as to the Postmaster General's detention of mail had become moot because the Postmaster General had treated the filing of the suit as a request for the delivery of the detained mail, and therefore had released the particular mail involved and had issued instructions that further mail addressed to the plaintiff there should not be detained; and (2) that insofar as the suit challenged the retention of the plaintiff's name on a Post Office list or in its files of persons who had requested such mail, it did not present any justiciable controversy. The government has filed a motion to affirm in the *Lamont* case, in which it argues that the district court properly dismissed the complaint without reaching the substantive issues, and that this Court should affirm on that ground. We further stated, however, that since the constitutional claim cannot be considered insubstantial, probable jurisdiction should be noted if the Court were of the view that there is a substantial question concerning the district court's ground for dismissal.

We see no occasion to depart from the normal processes of appellate review in this case. If the Court grants our motion to affirm in *Lamont*, we believe that

the ruling would control the present case; in any event, the court of appeals is the proper tribunal to determine initially whether the present case is distinguishable from *Lamont*. If, on the other hand, this Court should note probable jurisdiction in *Lamont*, the court of appeals can then decide whether to decide this case or defer further proceedings until *Lamont* has been decided. There is no occasion to add an unnecessary case to the docket in advance of decision by the court of appeals. If the Court should note probable jurisdiction in *Lamont*, the government would consent to the filing in that case of a brief *amicus curiae* by the present petitioners.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

NOVEMBER 1964.

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